

Division of Powers:

**A Thin Line Between Health and Crime: Reference re Assisted
Human Reproduction Act and Federalism Disputes in Areas of
Shared Jurisdiction**

Prepared For: Legal Education Society of Alberta
Constitutional Law Symposium

Presented by:
Professor Ubaka Ogbogu
University of Alberta, Faculty of Law
Edmonton, Alberta

For Presentation In:
Edmonton – Sept. 28, 2012

A Thin Line Between Health and Crime: *Reference re Assisted Human Reproduction Act* and Federalism Disputes in Areas of Shared Jurisdiction

Ubaka Ogbogu

Assistant Professor and Katz Research Fellow

Faculty of Law, University of Alberta

When should health be treated as a subject of criminal law? And what does the answer to this question hold for federalism disputes over topics within the shared jurisdiction of Parliament and the provinces?

In *Reference re Assisted Human Reproduction Act (AHRA Reference)*,¹ Lebel and Deschamps JJ,² in a minority opinion on the point, held that Parliament's power to enact criminal law with respect to health matters must target conduct that presents "real" evil and a "reasoned apprehension of harm"³ (collectively, the "concrete basis and reasoned apprehension of harm threshold"). This position marks a departure from precedent, which merely requires that such criminal legislation "contain a prohibition accompanied by a penal sanction and...be directed at a legitimate public health evil."⁴ A close reading of the decision makes clear that the main impetus for this new requirement is to tame federal incursion into provincial legislative territory via the criminal law power, especially in areas of shared legislative jurisdiction such as the regulation of health.

The aim of this brief symposium paper is to highlight and discuss a few reasons why I think this new requirement provides a sensible and useful demarcation between federal and provincial interests in health. I will argue that at a minimum, the concrete basis and reasoned apprehension of harm threshold moves us closer to finding a principled solution to federalism disputes over health regulation.

Before proceeding, it is worth noting that others have urged the imposition of constitutional limits on the federal criminal law power where it purports to regulate certain areas of health care and research. My colleagues Barbara Billingsley and Timothy Caulfield have argued, for example, that a federal criminal ban on certain types of health research amounts to an

¹ 2010 SCC 61, [2010] 3 S.C.R. 457.

² Abella and Rothstein JJ concurring.

³ See generally *supra* note 1 at 560.

⁴ *RJR MacDonald Inc v Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 245-47 (LaForest J). See also *supra* note 1 at 486-87.

unjustifiable violation of the right of freedom of expression guaranteed by the *Charter*.⁵ This argument was not engaged in the *AHRA Reference*, primarily for the reason that research activities banned in the *Assisted Human Reproduction Act*⁶ were neither challenged nor in issue in the case.

The discussion that follows is loosely divided into two sections. In the first, I will provide a brief backgrounder of the facts and issues in the *AHRA Reference* as a primer for the discussion in the second section, which will focus principally on the judicial reasoning behind the concrete basis and reasoned apprehension of harm threshold and on my own reflections on the mission of this paper, expressed above.

Overview of the *Assisted Human Reproduction Act* and *Reference re Assisted Human Reproduction Act*⁷

The *Assisted Human Reproduction Act* was enacted into law in 2004 following almost a decade of deliberative activities provoked by concerns over the health and social implications of technology-assisted procreation and related research.⁸ In June 2012, following the invalidation of several provisions of the legislation by the Supreme Court in the *AHRA Reference*, Parliament repealed the offending sections and amended the Act.⁹

The original version of the Act was a sweeping piece of criminal legislation that combined outright prohibitions, regulatory controls and diverse administrative mechanisms to govern a broad range of clinical, commercial and research activities related to assisted human reproduction. The Act applied to two broad classes of activities: a) those considered harmful or morally reprehensible in light of its objectives, which were and remain prohibited (referred to in the Act as “prohibited activities”);¹⁰ and b) health care and research activities

⁵ Barbara Billingsley & Timothy Caulfield, “The Regulation of Science and the Charter of Rights: Would a Ban on Non-Reproductive Human Cloning Unjustifiably Violate Freedom of Expression?” (2004) 29:2 *Queen’s LJ* 647. Compare Jocelyn Downie, Jennifer Llewellyn & Francoise Baylis, “A Constitutional Defence of the Federal Ban on Human Cloning for Research Purposes” (2005) 31:1 *Queen’s LJ* 353.

⁶ SC 2004, c 2. See generally ss 5 – 9, 12. See further Ubaka Ogbogu & Peter Rugg-Gunn, “The Legal Status of Novel Stem Cell Technologies in Canada” (2008) 5:5 *Journal of International Biotechnology Law* 186; Ubaka Ogbogu, Timothy Caulfield & Shane Green, “From Human Embryos to Interspecies Creations: Ethical and Legal Uncertainties Surrounding the Creation of Cytoplasmic Hybrids For Research” (2008) 9 *Medical Law International* 227.

⁷ This section is a revised excerpt from Ubaka Ogbogu, “*Reference re Assisted Human Reproduction Act* and the Future of Technology-Assisted Reproduction and Embryo Research in Canada” (2011) 19 *Health Law Journal* 153.

⁸ For a detailed history of the Act, see Francoise Baylis & Matthew Herder, “Policy Design for Human Embryo Research in Canada: A History (Part 1 of 2)” (2009) 6:1 *Bioethical Inquiry* 109.

⁹ The amendments were enacted as part of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 713.

¹⁰ *Supra* note 1, ss 5-9, 12. Prohibited activities include the creation of human chimera embryos and human clones, *in vitro* creation of human embryos for non-reproductive use, creation of hybrids for reproductive use,